

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

URBAN MCCONNELL,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

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2:12-cv-01601-RCJ-PAL

ORDER

This is a slip-and-fall case. Pending before the Court are two Motions in Limine (ECF Nos. 47, 48). For the reasons given herein, the Court grants the motions in part and denies them in part.

I. FACTS AND PROCEDURAL HISTORY

On or about December 10, 2010, Plaintiff Urban McConnell slipped, fell, and injured himself at the Wal-Mart store at 8060 W. Tropical Pkwy., Las Vegas, Nevada after an employee mopped the floor and left water thereupon without blocking access to the area or warning customers. (Compl. ¶¶ 5–9, Aug. 7, 2012, ECF No. 1-2). Defendant removed and moved for summary judgment as against the claim for punitive damages. Plaintiff stipulated to dismiss the prayer for punitive damages, and the Court therefore denied the motion as moot, noting that it would have been inclined to grant it. A jury trial is set for February 18, 2014 in Las Vegas. Defendant has now filed two motions in limine.

II. LEGAL STANDARDS

A motion in limine is a procedural device to obtain an early and preliminary ruling on the

1 admissibility of evidence. Black's Law Dictionary defines it as "[a] pretrial request that certain
2 inadmissible evidence not be referred to or offered at trial. Typically, a party makes this motion
3 when it believes that mere mention of the evidence during trial would be highly prejudicial and
4 could not be remedied by an instruction to disregard." *Black's Law Dictionary* 1109 (9th ed.
5 2009). Although the Federal Rules of Evidence do not explicitly authorize a motion in limine,
6 the Supreme Court has held that trial judges are authorized to rule on motions in limine pursuant
7 to their authority to manage trials. *See Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (citing
8 Fed. R. Evid. 103(c) (providing that trial should be conducted so as to "prevent inadmissible
9 evidence from being suggested to the jury by any means"))).

10 Judges have broad discretion when ruling on motions in limine. *See Jenkins v. Chrysler*
11 *Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002). However, a motion in limine should not be
12 used to resolve factual disputes or weigh evidence. *See C&E Servs., Inc., v. Ashland, Inc.*, 539 F.
13 Supp. 2d 316, 323 (D.D.C. 2008). To exclude evidence on a motion in limine "the evidence
14 must be inadmissible on all potential grounds." *E.g., Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp.
15 2d 844, 846 (N.D. Ohio 2004). "Unless evidence meets this high standard, evidentiary rulings
16 should be deferred until trial so that questions of foundation, relevancy and potential prejudice
17 may be resolved in proper context." *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F. Supp.
18 1398, 1400 (N.D. Ill. 1993). This is because although rulings on motions in limine may save
19 "time, costs, effort and preparation, a court is almost always better situated during the actual trial
20 to assess the value and utility of evidence." *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1219
21 (D. Kan. 2007).

22 In limine rulings are preliminary and therefore "are not binding on the trial judge [who]
23 may always change his mind during the course of a trial." *Ohler v. United States*, 529 U.S. 753,
24 758 n.3 (2000); *accord Luce*, 469 U.S. at 41 (noting that in limine rulings are always subject to
25 change, especially if the evidence unfolds in an unanticipated manner). "Denial of a motion in

1 limine does not necessarily mean that all evidence contemplated by the motion will be admitted
2 to trial. Denial merely means that without the context of trial, the court is unable to determine
3 whether the evidence in question should be excluded.” *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

4 **II. ANALYSIS**

5 **A. Motion No. 47**

6 Defendant seeks to exclude Plaintiff’s proffered expert, John Peterson, because he is not
7 qualified as an expert and because his testimony will be irrelevant. Mr. Peterson is offered as an
8 expert in the area of the standard of care. Mr. Peterson’s curriculum vitae indicates that his area
9 of expertise is better described as loss (theft) prevention. In response, Plaintiff argues that Mr.
10 Peterson is an expert in the area of retail safety and that his proffered testimony satisfies Rule
11 702 under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) because it is
12 based upon his personal knowledge and experience. Plaintiff admits that Mr. Peterson has no
13 formal education in the area of safety but argues that his experience qualifies him as an expert
14 under Rule 702. As a rebuttal to Defendant’s argument that Mr. Peterson has previously been
15 rejected as an expert in the present context in Nevada state court, Plaintiff adduces as Exhibits 1
16 and 2 copies of orders: (1) denying a motion in limine to exclude Mr. Peterson as an expert in
17 Arizona state court; and (2) accepting Mr. Peterson as an expert in retail safety in a case in this
18 District. Plaintiff also adduces as Exhibit 3 Mr. Peterson’s report itself, which includes a list of
19 his qualifications. The fact that Mr. Peterson has been accepted as an expert by some judges and
20 rejected by others indicates that the question of his expertise in the present context is a close one,
21 and the Court also notes that copies of orders denying the preliminary exclusion of Mr.
22 Peterson’s proffered expert testimony are no evidence of his ultimate admission as an expert at
23 trial. Although Plaintiff argues that Mr. Peterson received some safety-related training at Wal-
24 Mart and even provided the training to other employees, it is not clear whether this kind of
25 training was a significant portion of Mr. Peterson’s duties at Wal-Mart, or if it was simply

1 incidental to his employment, i.e., such as anti-discrimination or first-aid training all employees
2 at a company might receive from their employer. Plaintiff does not appear to claim that Mr.
3 Peterson ever held a title such as “Safety Officer,” but does appear to claim that as a loss
4 prevention officer, part of his formal duties included customer safety. It is simply not clear at
5 this time whether Mr. Peterson’s experience in the retail industry includes significant or only
6 incidental knowledge of safety procedures. The Court would therefore normally not exclude an
7 expert whose qualifications were simply doubtful at this stage, but would require the relevant
8 party to show that he is qualified as an expert at trial.

9 However, in the present case, even assuming Mr. Peterson were qualified as an expert, his
10 testimony would largely be more confusing than helpful to the jury. The Court will of course
11 instruct the jury on the standard of care, and it is for the jury to consider whether Defendant acted
12 reasonably. Only if the case concerned a heightened, particularized standard of care, such as in a
13 professional malpractice case, would expert testimony as to the standard of care be more helpful
14 than confusing to the jury. Only in such cases does a jury require expert testimony as to what
15 constitutes reasonable behavior. A layman may evaluate reasonable behavior in the context of
16 everyday events, such as mopping a floor in a retail store, without resort to expert assistance.
17 Finally, whether Defendant adhered to its own policies—apparently another area in which Mr.
18 Peterson would testify—is simply not relevant to whether it was negligent in this case.
19 Adherence to insufficient policies will not exculpate a negligent defendant any more than non-
20 adherence to sufficient policies will inculcate him. Whether a defendant’s actions in a particular
21 instance are negligent does not at all depend upon his habits or personal guidelines for his own
22 behavior. Mr. Peterson may testify as to industry standards if the Court finds him qualified as an
23 expert in this area at trial, but testimony concerning the general standard of care would be more
24 confusing than helpful to the jury, and testimony concerning Wal-Mart’s own policies and
25 whether Defendant’s employees adhered to them in this case would be irrelevant.

1 **B. Motion No. 48**

2 **1. The Collateral Source Rule and “Write-Downs”**

3 Defendant asks the Court to exclude evidence of medical bills that have been partially or
4 totally forgiven by Plaintiff’s providers, i.e., “write-downs.” Defendant argues that the collateral
5 source rule does not apply to write-downs, because they do not represent money that anybody has
6 paid. The Court denies the motion in this regard.

7 The Nevada Supreme Court does not permit the admission of evidence of collateral
8 sources of payment for any purpose whatsoever. *Proctor v. Castelletti*, 911 P.2d 853, 854
9 (Nev.1996) (“We now adopt a *per se* rule barring the admission of a collateral source of payment
10 for an injury into evidence for *any* purpose.” (emphases added)). The collateral source rule
11 makes the tortfeasor liable for the full extent of the damages caused, no matter how much the
12 victim actually pays. That a medical provider ultimately accepts less than a billed amount,
13 whether from an insurance company or from the victim directly, is not relevant to whether the
14 tortfeasor is liable for the full value of the harm he has caused. The collateral source rule is an
15 equitable rule specifically designed to ensure that the victim, and not the tortfeasor, benefits from
16 any “windfall” resulting from a difference between the value of the harm caused and the amount
17 actually paid to remedy it. If a victim can remedy his harm at a “bargain” rate, the “windfall”
18 represented by the difference belongs to the victim, not to the tortfeasor.

19 As controversial as the collateral source rule is, whether the rule should apply to “write-
20 downs” is even more so. This court has ruled before that there is no principled reason to
21 distinguish a “bargain” obtained by virtue of the fact that an insurer rather than a victim pays a
22 bill from a “bargain” obtained by virtue of the fact that a medical provider accepts partial
23 payment (from the victim or the insurer) in satisfaction of the bill, i.e., a “write-down.” In both
24 cases, the victim may recover from the tortfeasor a verdict beyond his actual expenses.

25 Defendant’s citations to *Tri-County Equip. & Leasing, LLC v. Klinke* are not availing.

1 *Klinke* was a statutory interpretation case concerning whether a Nevada statute permitting the
2 admission of workers compensation payments, but also mandating that a jury be instructed not to
3 count those payments against a plaintiff's verdict, applies to payments made by out-of-state
4 workers compensation systems (it does). *See* 286 P.3d 593, 595–96 (Nev. 2012). The *Klinke*
5 Court ruled that because the admission of collateral workers compensation payments is
6 permitted, and because the amount of such payments “necessarily incorporates” any write-downs,
7 the Court did not need to consider any general exception to the collateral source rule for
8 write-downs. *See id.* at 596. In other words, the relevant workers compensation statute in *Klinke*
9 explicitly permitted the admission of evidence of collateral payments from workers
10 compensation systems and therefore necessarily permitted the admission of the fact of any write-
11 downs, because payments are of course made after any write-downs are applied. But the
12 outcome depended purely upon a workers compensation statute that does not apply in general tort
13 cases such as the present one. Therefore, the language of *Proctor* remains intact after *Klinke*: not
14 admissible “for any purpose.” *Proctor*, 911 P.2d at 854.

15 The question remains whether a write-down is a “payment” as contemplated under
16 *Proctor*. The Court believes that it is. A creditor's forgiveness of debt—that is what a write-
17 down in the present context amounts to—is often considered equivalent to payment in other
18 contexts, e.g., income tax, credit bids at foreclosure, etc. In other words, a creditor's partial
19 forgiveness of a tort victim's medical bills via a write-down is properly considered a third-party
20 “payment,” evidence of which is barred by the collateral source rule. The Court rejects the
21 *Howell* Court's rationale that a write-down is not equivalent to forgiveness of debt because write-
22 downs are prearranged between insurers and providers. *See Howell v. Hamilton Meat &*
23 *Provisions*, 257 P.3d 1130, 1138–39 (Cal. 2011). A prearranged, yet conditional, forgiveness of
24 debt is still forgiveness of debt, and write-downs are conditional upon payment by a particular
25 third-party payor. If an insurer ultimately rejects coverage for any reason, or if payment by the

insurer is otherwise frustrated after treatment, the provider can, and presumably will, still charge the full rate to the patient. Even if there is a preexisting arrangement for a write-down, the write-down does not actually take effect until payment by the insurer is accepted by the provider, i.e., *after* treatment has been rendered, which is when the patient's duty to pay for it is incurred. Providers will not typically provide treatment until a patient signs a "financial responsibility" document whereby the patient agrees to pay the full price himself if the insurer ultimately rejects coverage.

The *Howell* Court's ruling that "if the plaintiff negotiates a discount and thereby receives services for less than might reasonably be charged, the plaintiff has not suffered a pecuniary loss or other detriment in the greater amount and therefore cannot recover damages for that amount," *id.* at 1138, applies with equal force to the collateral source rule generally, yet the *Howell* Court appears to have left the collateral source rule intact as to direct third-party payments. The result is schizophrenic, because in neither case—third-party payment of a debt or third-party forgiveness of the same debt—does the plaintiff actually incur any economic loss beyond the amount he is actually made to pay out of his pocket. The *Howell* case is therefore squarely at odds with the collateral source rule, which utterly disregards the amount of money a tort victim is actually made to pay to remedy his injuries, in favor of awarding the reasonable cost of ameliorating the injuries, notwithstanding any potential "double recovery" by the tort victim. The Court will not predict that the Nevada Supreme Court would adopt such an incoherent rule. The dissenting opinion of Judge Klein in the *Howell* case accurately reflects both the reasoned view of this Court and, more importantly, this Court's prediction of the way the Nevada Supreme Court would address the issue. *See generally id.* (Klein, J., dissenting). That is, Plaintiff may recover the *reasonable* value of his treatment, and no more, without regard to whether the amount he paid out of his pocket directly in order to obtain that treatment was reduced by a third-party payor or a third-party payee. *See id.* at 1147–48 (Klein, J., dissenting); *Klinke*, 286 P.3d at

1 598 (Gibbons, J., concurring) (“Evidence of payments showing write-downs is irrelevant to a
2 jury’s determination of the reasonable value of the medical services and will likely lead to jury
3 confusion.”). This is in fact the majority rule. *Klinke*, 286 P.3d at 599 (Gibbons, J., concurring)
4 (collecting cases); *see also* Restatement (Second) of Torts § 920A cmt. c, subsec. (3) (1979)
5 (“Thus the fact that the doctor did not charge for his services or the plaintiff was treated in a
6 veterans hospital does not prevent his recovery for the reasonable value of the services.”). And it
7 is for Defendant to show that Plaintiff’s medical bills were unreasonable in-and-of-themselves
8 under the affirmative defense of mitigation of damages.

9 The collateral source rule has always been controversial, but it is not for this Court to
10 create exceptions to it, and the Court estimates that the Nevada Supreme Court would not create
11 an exception here, anyway. Defendant may attempt to prove at trial that the amounts billed by
12 Plaintiff’s medical providers were unreasonable in-and-of-themselves—assuming Defendant has
13 experts to provide such testimony—but Defendant may not under the collateral source rule argue
14 that any amount written down is necessarily unreasonable by the very fact that the amount was
15 written down. Again, the rule recognizes that a tort victim may receive a “windfall,” but that
16 windfall belongs to the victim, not to the tortfeasor. The Court simply cannot find a convincing
17 rationale to exclude evidence of the partial satisfaction of a tort victim’s tort-related bills by a
18 third-party *payor* but not to exclude evidence of the partial satisfaction of the very same bills by a
19 third-party *payee*. In both cases, a tort victim has remedied his harm at a bargain rate yet stands
20 to recover damages from the tortfeasor at full price.

21 The policy of encouraging people to purchase automobile insurance does not make it
22 more important to apply the collateral source rule in cases of third-party payment than in cases of
23 third-party forgiveness. The “encouragement” rationale is itself weak. The average person’s fear
24 of criminal liability for driving without insurance surely overshadows any concerns about the
25 collateral source rule, a rule about which the vast majority of people, and even many lawyers, are

1 totally unaware. Certainly the rule *benefits* those who have insurance, but it can only *encourage*
2 people to buy insurance if they know about the rule, and it is probably not the case that any
3 meaningful percentage of laymen are aware of the collateral source rule. And although
4 California’s cases sometimes state that the rule encourages the purchase of insurance, *see, e.g.,*
5 *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 66 (Cal. 1970) (stating without citation that
6 “[t]he collateral source rule expresses a policy judgment in favor of encouraging citizens to
7 purchase and maintain insurance”), it is far from clear that any such rationale underlies the rule,
8 *see, e.g., Loggie v. Interstate Transit Co.*, 291 P. 618, 619–20 (Cal. Ct. App. 1930) (citing *Clark*
9 *v. Burns Hammam Baths*, 236 P. 152 (Cal. Ct. App. 1925)) (noting that the rule arises out of the
10 simple fact that a tortfeasor must pay for the harm he causes, and that no separate relationship
11 between his victim and an insurance company has anything to do with the matter). The
12 encouragement rationale appears to have been applied as supplemental support for the rule in the
13 late Twentieth Century long after the rule’s genesis in the early Twentieth Century under the
14 irrelevancy rationale. But even assuming, *arguendo*, that the encouragement rationale is the
15 primary force behind the collateral source rule, and even if we were to entertain the fantasy that
16 the average person is aware of these kinds of legal obscura and orders his life around them, the
17 inclusion of write-downs within the rule serves to encourage the purchase of insurance just as the
18 third-party payment rule itself supposedly does, because third-party forgiveness in the form of
19 write-downs (like third-party payments) do not typically occur except where the tort victim is
20 insured.

21 It is not entirely clear what type of insurance coverage—automobile insurance or health
22 insurance—the collateral source rule is typically presumed to encourage. But if we entertain the
23 notion that the rule in fact encourages the purchase of insurance wherever coverage would be
24 beneficial under the rule, then we must assume it encourages the purchase of *both* kinds of
25 insurance. The rule encourages the purchase of uninsured and underinsured motorist (“UIM”)

1 coverage and medical bills coverage by potential tort victims,¹ because one can then rest assured
 2 that one's UIM and medical bills coverage will not be used to reduce one's recovery in tort.² The
 3 rule likewise encourages the purchase of health insurance, because one can then rest assured that
 4 one's health insurance coverage will not be used to reduce one's recovery in tort. Modern health
 5 insurance plans, however, are incredibly complex. The direct payments health insurers make to
 6 medical providers are only part of the benefits they provide to their insureds. Write-downs are
 7 another benefit for which insureds pay consideration (via premiums) that can be just as valuable
 8 as direct payments. *See Klinke*, 286 P.3d at 598 (Gibbons, J., concurring) (citing *Acuar v.*
 9 *Letourneau*, 531 S.E.2d 316, 322 (Va. 2000)).³ Medical providers offer write-downs to health

11 ¹Except where UIM coverage is not available unless one also purchases liability
 12 insurance, the rule neither encourages nor discourages the purchase of liability insurance,
 13 because payment of a tort victim's bills by the tortfeasor's insurance company is legally
 14 equivalent to payment by the tortfeasor himself, i.e., it is a *second*-party payment, not a third-
 15 party payment within the collateral source rule, and a tort victim's own liability insurance is not
 16 implicated at all.

17 ²This is true at least where an insurer cannot be subrogated to medical damages, such as
 18 in Nevada. *See Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 814–15 (Nev. 1986).

19 ³The *Howell* Court reasoned that the fact that these kinds of write-downs arise out of
 20 negotiated, commercial considerations mitigates *against* applying the collateral source rule,
 21 because the write-downs are not pure gratuities that implicate § 920A of the Second Restatement.
 22 *See Howell*, 257 P.3d at 1139–40. But the reasoning that write-downs should not be included
 23 within the collateral source rule precisely because they arise out of economic considerations is
 24 odd in light of the fact that the *Howell* Court did not take issue with the long-accepted notion in
 25 the California courts that the economic-incentive-to-the-tort-victim theory drives the collateral
 source rule generally. The Restatement's inclusion of pure gifts within the rule is an *additional*
 inclusion driven by the windfall theory, but there is no reason to abandon the economic incentive
 rationale wherever there has been any benefit to the tort victim resembling a gift but not literally
 constituting one. In such a case, the rule suggested in § 920A may not be implicated, but a court
 that wishes to further the purposes behind the collateral source rule should still examine whether
 a tort victim who has purchased insurance is benefitted by that fact via the application of the rule
 in a new context.

Perhaps the *Howell* Court simply failed or refused to recognize that an insured benefits
 from write-downs in exchange for his insurance premium payments. That is, write-downs are
 not an insulated insurer-provider transaction but are inextricably linked to the economic benefit
 an insured receives from his insurance contract. Write-downs exist because of preferred provider

1 insurance companies who use them as preferred providers. Write-down agreements are in
2 essence bulk pricing plans. An insured's premium payments are not only for the benefit of direct
3 payments to providers but for all the benefits the plan provides, and those benefits include
4 written-down costs by preferred providers. The insured has provided consideration for the value
5 of the written down costs by paying his health insurance premiums and choosing a preferred
6 provider, just as the insured has provided consideration for the value of direct payments by the
7 insurer. Indeed, a third-party payment by a health insurance company and a third-party write-
8 down by a provider will typically occur in conjunction with one another such that the third-party
9 payment and the write-down are inextricably linked, i.e., the provider agrees to write down the
10 cost based upon the insurer making the payment. The rule applies here as to both payments by
11 the third-party insurer and forgiveness by the third-party provider in the form of write-downs
12 negotiated with the third-party insurer in a way inextricably linked to the insured's benefits under

13
14 agreements between insurers and providers, which in turn only exist because of the contractual
relationships between insurers and insureds.

15 Or perhaps the *Howell* Court's conclusion arises primarily out of its frustration with the
16 market for medical care, i.e., the fact that rates for care fluctuate wildly based upon the identity of
the payor and are driven by a mishmash of disjointed, dysfunctional, or unseemly considerations.
17 *See id.* at 1141–42. But a court's discomfort with the difficulties in calculating a market value
for medical damages apart from the amount actually paid (because of the complexities inherent in
18 modern medical billing) is no reason to take from a plaintiff or a defendant the ability to argue to
the jury the amount of damages actually caused, and in federal court, anyway, the *Howell* Court's
19 resolution of the issue is simply not permitted. *See* U.S. Const. amend. VII. Plaintiffs have a
federal constitutional right to argue their damages to a jury, and defendants have a similar right to
20 argue against those damages, notwithstanding any judge's concerns that proving or calculating
damages may be difficult for the parties and the jury, respectively, as a practical matter. The
21 Seventh Amendment limits a judge's role to ensuring that any jury verdict is supported by the
evidence and giving the Plaintiff a choice between a new trial and a verdict reduced to an amount
22 supported by the evidence. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 914–15 (2nd Cir.
1997). The fact that medical billing rates vary so widely simply broadens the scope of a
23 permissible jury verdict measured by "market value." Surely the issue is not more complex than
a calculation of *non-economic* damages, which by their nature have no "accurate" value but
24 awards of which are routinely permitted under various theories of calculation. Courts themselves
also routinely determine the reasonable value of attorney's fees, which also have no fixed,
25 "correct" value.

1 his policy.

2 **2. Miscellaneous Requests for Exclusion**

3 Defendant asks the Court to exclude evidence of or remarks concerning Defendant's
4 financial condition. Plaintiff does not object. The Court grants the motion in this regard.
5 Punitive damages are no longer available in this case, and punitive damages was the only issue in
6 the case to which Defendant's financial condition would have been relevant. *See* Fed. R. Evid.
7 401, 402.

8 Defendant asks the Court to prevent counsel for Plaintiff from mentioning or publishing
9 evidence to the jury before giving counsel for Defendant the opportunity to inspect it. Plaintiff
10 does not object. The Court grants the motion in this regard. No rule requires the practice, but the
11 parties appear to have agreed to it. Counsel is aware of the rules preventing publication of
12 evidence to the jury before it has been admitted and preventing the mention of evidence during
13 opening statements or closing arguments that will not be or has not been presented at trial.

14 Defendant asks the Court to exclude evidence of its liability insurance because ownership
15 and control of the premises is not disputed. Plaintiff does not object. The Court grants the
16 motion in this regard. *See* Fed. R. Evid. 411.

17 Defendant asks the Court to exclude witnesses from the Courtroom until they are called
18 to testify, except for Plaintiff and Defendant's trial representative. The Court grants the motion
19 in this regard. *See* Fed. R. Evid. 615. Plaintiff argues only that the rule should not apply to expert
20 witnesses because its purpose is to preclude "fact witnesses" from shaping their testimony based
21 upon the testimony of other witnesses. The rule includes several exceptions, none of which are
22 for expert witnesses, and the purpose behind the rule applies equally to expert witnesses, who
23 may also shape their testimony based upon what they hear before they testify. Simply because
24 expert witnesses may base their opinions upon things heard in the courtroom does not mean they
25 are always immune from exclusion before testifying under Rule 615. Expert witnesses are

1 excluded under Rule 615 only if their presence before testifying is essential to the party's case,
2 i.e., when they must be present to base their opinion upon the facts heard from other witnesses.
3 *See* Fed. R. Evid. 615(c); *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 629 (4th Cir. 1996)
4 ("In the case before us, even if [the expert] were going to testify only as an expert, Heritage Park
5 failed to establish that he needed to hear the trial testimony of the other witnesses in order to
6 render his opinions. [The expert] had received and reviewed all of Opus 3's records, including
7 its expert's records of the cost of services rendered, and had prepared a written analysis well
8 before trial."). The same is true here.

9 Defendant asks the Court to exclude any evidence of subsequent remedial measures
10 pertaining to Plaintiff's alleged fall. The Court grants the motion in this regard. *See* Fed. R.
11 Evid. 407. Plaintiff objects that evidence of remedial measures will be admissible under the
12 feasibility or impeachment exceptions if Wal-Mart "argues that any subsequent measures were
13 either unnecessary or merely a precautionary measure." But Wal-Mart will not have to argue
14 this, because evidence of subsequent remedial measures will not be admitted in the first instance,
15 so Wal-Mart will not have to attempt to explain away why it may have taken any such measures.
16 Of course, if Wal-Mart "opens the door" by arguing or eliciting testimony concerning the alleged
17 infeasibility of precautionary measures, the analysis will change, but the Court is not yet facing
18 those circumstances, and it is unlikely to occur at trial.

19 Defendant asks the Court to exclude any mention of where counsel resides or practices as
20 irrelevant. Plaintiff does not object. The Court grants the motion in this regard. *See* Fed. R.
21 Evid. 401, 402.

22 Defendant asks the Court to exclude evidence from other incidents with no factual nexus
23 to the present case. Plaintiff does not object. The Court grants the motion in this regard. *See*
24 Fed. R. Evid. 401, 402, 404(b).

25 Defendant asks the Court to exclude evidence of settlement negotiations and factual

1 statements made therein. Plaintiff does not object. The Court grants the motion in this regard.

2 *See* Fed. R. Evid. 408.

3 Defendant asks the Court to exclude the portions of Plaintiff's medical records containing
4 hearsay. The Court grants the motion in part in this regard. Medical records themselves are
5 potentially admissible under the business records exception. *See* Fed. R. Evid. 803(6). The
6 doctor's statements therein are therefore not hearsay under Rule 803(6) so long as he made the
7 statements under a business duty. The statements of others recorded within such records are still
8 hearsay if not separately excluded or excused, i.e., they are double-hearsay. Plaintiff's statements
9 to his doctor made for the purpose of treatment are not hearsay. *See* Fed. R. Evid. 803(4). This
10 includes statements concerning the manner of Plaintiff's fall, e.g., "I slipped on wet concrete and
11 fell flat onto my right side" or "I couldn't move my right leg for thirty seconds." However, any
12 statements of fault or fact that were not necessary for medical treatment are hearsay and are not
13 admissible, e.g., "there were no warning signs" or "an employee had just mopped the floor."

14 Defendant asks the Court to exclude an allegedly prejudicial statement, i.e., the
15 deposition testimony of Jesus Flores that "humid" means "slightly wet." Defendant argues that
16 Plaintiff's counsel badgered the witness into making this comparison. The Court denies the
17 motion in this regard. Plaintiff adduces the full exchange in his opposition, and it appears that
18 counsel only asked the witness if the floor was "slightly wet" after the witness said it was
19 "humid." It was reasonable for counsel to ask the witness to admit that a "humid" surface was a
20 "slightly wet" surface, because it makes no sense for a solid surface to be "humid," as the witness
21 had first described the floor. The English word "humid" refers to high levels of water vapor in
22 the air. The English word "wet" refers to liquid water on a solid surface. It was clear the witness
23 was conflating humidity with spilled water or condensation when he initially testified, "To me,
24 humid is [sic] water falls, you dry it up, and the floor remains wet." It may also be that the
25 witness is a native Spanish speaker, and the Spanish word "humedo" can mean either "humid" or

1 “wet.” Defendant had the opportunity to examine the witness, and Defendant will have the
2 opportunity to examine or cross-examine any witness at trial who will introduce this deposition
3 testimony to give the jury the context of the exchange.

4 Defendant asks the Court to exclude the testimony of Dan Holland because he was not
5 timely disclosed as a witness in Plaintiff’s initial disclosure or any of his eight supplemental
6 disclosures. The Court denies the motion in this regard. *See* Fed. R. Evid. 37(c)(1). Plaintiff
7 argues that Defendant has had actual knowledge of Mr. Holland and his expected testimony and
8 that there has been no harm to Defendant from any failure to formally disclose him. Plaintiff
9 notes that it disclosed “A Member of Management of Wal-Mart Store #2884” and that Mr.
10 Holland’s deposition was taken eight months before trial. The Court finds that Plaintiff has not
11 shown that it formally disclosed Mr. Holland as a witness by name, address, and telephone
12 number. Plaintiff has, however, satisfied his burden of showing harmlessness or substantial
13 justification. Defendant should have anticipated the store manager on duty during the incident
14 would be called as a witness at trial, especially in light of the deposition and the relevant
15 testimony given during that deposition.

16 Defendant asks the Court to exclude any mention of alleged surveillance footage.
17 Defendant argues that there is no such footage and that Plaintiff has never sought it through
18 discovery. The Court grants the motion in part in this regard. Plaintiff may not refer to footage
19 as if it exists unless he will produce it. He may ask witnesses if they have any knowledge of
20 surveillance footage of the incident if he has a good faith belief that there may have been some
21 and that the witness knows of it or saw it. Specifically, he may ask Mr. Holland about the
22 existence or non-existence of any video footage of the incident and related questions within the
23 scope of Mr. Holland’s direct knowledge. The Court will wait until it has heard the relevant
24 testimony at trial before determining whether to issue an adverse inference instruction.

25 Defendant asks the Court to exclude the testimony of Mary Soto in three respects. It asks

1 the Court to exclude any testimony concerning whether Soto's post-incident investigation
2 violated Wal-Mart's procedures. The Court grants the motion in this regard. *See* Fed. R. Evid.
3 401, 402. The answers to those questions would not be relevant to any issue in the case.
4 However, Plaintiff may ask questions regarding what Soto learned of the incident (if otherwise
5 admissible), how she treated any evidence, etc.

6 Defendant also asks the Court to exclude any testimony concerning Soto's opinions
7 concerning the cause of Plaintiff's alleged fall because she has no first-hand knowledge of the
8 fall and she is not an expert. The Court grants the motion in part in this regard. Soto may testify
9 as to her lay opinion of the cause of the fall if she witnessed it. Such an opinion is within the
10 experience of a lay person. If she did not witness the fall, she may still testify as to facts of
11 which she has direct knowledge, such as whether she noticed a slippery substance on the floor
12 immediately after the fall, whether she knew if the area was roped off, etc.

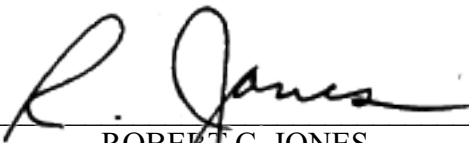
13 Finally, Defendant asks the Court to exclude testimony concerning the impact of
14 customer incidents on employee bonuses. The Court grants the motion in part in this regard.
15 This evidence would more prejudicial than probative considered in a vacuum, but it might be
16 relevant if offered for impeachment of an employee as to bias or motive to lie.

17 CONCLUSION

18 IT IS HEREBY ORDERED that the Motions in Limine (ECF Nos. 47, 48) are
19 GRANTED IN PART and DENIED IN PART.

20 IT IS SO ORDERED.

21 Dated this 4th day of February, 2014.

22 
23 ROBERT C. JONES
24 United States District Judge
25